No. 1090

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Supreme Court of the United States

OCTOBER TERM—1944.

ALFONSO DIUGUID,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1944.

ALFONSO DIUGUID,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court entered on February 27th, 1945 affirming a judgment of conviction of the District Court of the United States for the Eastern District of New York.

STATEMENT OF MATTERS INVOLVED.

The petitioner was indicted on four counts charging the unlawful possession of an unregistered still, the unlawful manufacture of alcohol, the conducting of business of distiller in violation of law and the unlawful possession of distilled spirits in containers lacking Internal Revenue stamps.

Prior to the trial a motion was made to suppress certain evidence—the still, alcohol, mash, etc.—seized in the petitioner's apartment, on the ground that the search of the petitioner's apartment and the seizure of the aforementioned articles were made by federal agents without a warrant of search and seizure or arrest and, therefore, such search and seizure violated the constitutional rights of the petitioner. The motion was denied, but the petitioner was given the right to renew upon the trial (fol. 5).

Upon the trial of the indictment, the petitioner waived his right to a trial by jury. At the outset counsel for the petitioner indicated the nature of the defense to be that the search and seizure without a warrant violated the petitioner's constitutional rights and consequently the evidence must be suppressed.

It was conceded that the petitioner resided in an apartment consisting of four rooms located on the top floor of a three-story apartment building located at 2016 Dean Street, Brooklyn, New York (fols. 26-28).

The government's case was based upon the testimony of two witnesses, to wit, a police officer of the City of New York and a federal agent of the Alcohol Unit Division of the Federal Government.

The police officer testified that after receiving information that a still was in operation, he went to the apartment of the petitioner (fol. 30). Unable to gain admittance, the police officer, who had no warrant either for the arrest of the petitioner or for the search and seizure of his apartment, forcibly broke into the petitioner's apartment (fols. 31-32). The police officer neither arrested the petitioner, nor seized the still, mash, and other articles (fol. 45).

Thereafter the police officer telephoned a federal agent at his home and, later, federal agents without a warrant for either the arrest of the petitioner or search and seizure, walked into the petitioner's apartment through the doorway, which had been forced by the police officer (fols. 39, 45).

The police officer had not seized nor had he removed the still, alcohol, mash, etc. Consequently, he did not turn said

articles over to the federal agents. The federal agents seized the still and other articles and then made the arrest (fols. 52-53).

The court below in affirming the conviction held that the federal agents did not act in concert with the police officer and concluded, therefore, that "when federal officers are not guilty of misconduct, evidence will not be suppressed merely because it was unlawfully seized by the police before the federal officers took possession of it". But in holding that the federal agents were not guilty of misconduct, the courts overlooked or ignored the central fact of misconduct and that is that the federal agents entered the apartment of the petitioner without his consent, without a warrant of search and seizure or for his arrest, and after it had been broken into by the police officer. The forcible and illegal entry by the police officer did not confer upon the federal agents the right to enter the apartment without the petitioner's consent. An illegal entry cannot make legal a subsequent unauthorized entry.

QUESTIONS PRESENTED.

1. Did the seizure of the still, alcohol, mash, etc. by the federal agents constitute an illegal seizure where it appears that such federal agents, without a warrant of search and seizure or arrest, entered the apartment of the petitioner through its doorway which had been previously forced by a city police officer who had no warrant of search and seizure or arrest and who had not made a seizure or arrest?

2. Does the forcible entry into a home by a city police officer without a warrant of search and seizure or arrest render it unnecessary for a federal agent to obtain a warrant of search and seizure?

3. Does the violation of a State Penal law by federal agents in making a search and seizure render evidence so illegally seized inadmissible in the federal courts?

4. Was it error for the court to admit into evidence the evidence which had been seized by the federal agents?

REASONS FOR ALLOWANCE OF WRIT.

1. The decision of the court below is in apparent conflict with the decisions of other Circuit Courts of Appeals on similar matters.

Gilbert v. *United States*, 144 Fed. 2nd 568, C. C. A. 10th Circuit;

Sutherland v. *United States*, 92 Fed. 2nd 305, C. C. A. 4th Circuit;

Miller v. *United States*, 50 Fed. 2nd 505, C. C. A. 3rd Circuit.

2. The decision of the court below holding admissible the evidence obtained by the federal agents in an unlawful search and seizure, is a decision upon a federal question in apparent conflict with the applicable decisions of this court.

3. The decision of the court below holding such evidence admissible is a decision upon an important question which has not been definitely decided, but should be settled by this court.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other and further relief as may seem proper.

Dated: New York, N. Y., March 24th, 1945.

HAROLD SHAPERO,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1944.

ALFONSO DIUGUID,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit has not yet been officially reported. It is annexed to the certified transcript of the record heretofore filed herein.

No opinion was rendered by the United States District Court for the Southern District of New York.

JURISDICTION.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on February 27th, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, U. S. C. Title 28, Section 347.

STATEMENT OF THE CASE.

A summary statement of the case is set forth in the petition. A summary of the argument is set forth in the index.

SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED.

It is intended to urge all the errors assigned (fols. 81-83) including the following:

1. It was error for the District Court to admit into evidence the articles to wit, still, alcohol, mash, etc., which were seized by the federal agents who were guilty of misconduct in entering the apartment of the petitioner and seizing the evidence without a warrant of search and seizure or arrest.

2. It was error for the court to hold that the search of the petitioner's apartment by the federal agents without a warrant was not an illegal and unconstitutional invasion of the petitioner's rights.

3. The court erred in denying the petitioner's motion to dismiss the indictment at the close of the government's case on the ground that the only evidence submitted was that obtained by the federal agents by an illegal search and seizure.

4. It was error for the court to refuse to return or suppress the evidence, to wit, still, alcohol and mash, illegally seized by the federal agents.

ARGUMENT.

I.

IT WAS ERROR FOR THE DISTRICT COURT TO ADMIT INTO EVIDENCE THE ARTICLES TO WIT, STILL, ALCOHOL, MASH, ETC., WHICH WERE SEIZED BY THE THE FEDERAL AGENTS WHO WERE GUILTY OF MISCONDUCT IN ENTERING THE APARTMENT OF THE PETITIONER AND SEIZING THE EVIDENCE WITHOUT A WARRANT OF SEARCH AND SEIZURE OR ARREST.

A.

The Federal Agents Were Guilty of Misconduct.

It was conceded upon the trial that neither the police officers nor the federal agents had warrants of search and seizure or arrest. Nor was the seizure incidental to a lawful arrest, the arrest having taken place after the search and seizure had been effected.

At the very outset it may be stated that this is not a case wherein a local police officer makes an illegal search and seizure and subsequently turns over the fruits of the search to federal agents who prosecute the case.

The record in the case at bar is clear that the federal agents were guilty of misconduct in making the search and seizure. They were guilty of the crime of unlawful entry when they entered the apartment of the petitioner without a warrant of search and seizure or arrest and seized the evidence. They were guilty of violating Sections 405, 1846 and 1847 of the Penal law of the State of New York. Section 405 provides that a person who, under circumstances or in a manner not amounting to a burglary, enters a building, or any part thereof, with intent to commit a crime, is guilty of a misdemeanor. Section 1846 prohibits a seizure without lawful authority and Section 1847 makes it a misdemeanor for an officer who in executing a search warrant willfully exceeds his authority, or exercises it with unnecessary severity.

A forceful condemnation of the government's use of evidence obtained by a criminal act may be found in the dissenting opinion of Mr. Justice Holmes in the case of *Olmstead* v. *United States*, 277 U. S. 438. At page 469 Mr. Justice Holmes stated in part as follows:

> "* * * But I think, as Mr. Justice Brandeis says, that apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act, * * * It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is obtained. If it pays its officers for having gotten evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits, we have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."

The government has sought to sustain the legality of the search and seizure upon the theory that the police officer initiated the search and thereafter notified the federal agents, who appeared upon the scene and "adopted" the case.

The government's contention, which was sustained by the court below, is based upon an erroneous theory, and a misinterpretation of the facts. In essence, the government's contention was, as set forth in the opinion of the court below, "when federal officers are not guilty of misconduct, evidence will not be suppressed merely because it was unlawfully seized by the police before the federal officers took possession of it." But in its holding, the court overlooked or ignored important facts.

The petitioner has hereinabove shown that the federal agents were guilty of misconduct and the record is clear that it was the federal agent who seized the evidence and not the

police officer. The police officer testified that the federal agent took over the still (fol. 42). The federal agent corroborated the police officer when he testified that he took over the still and arrested the petitioner (fols. 52, 53).

The unauthorized entry of the federal agents into the home of the petitioner, their search of the premises and seizure of the evidence constituted such misconduct and criminality on their part which must be held to have been a violation of the petitioner's constitutional rights.

There is no sanction in law for condoning the acts of the federal agents merely because they entered and searched the home of the petitioner upon a telephone call from the police officers, who themselves had forcibly and illegally entered the premises without a warrant. The fact that the police officers were forcibly in possession of the petitioner's home did not make it any less his home and did not make his home any less inviolate against search and seizure by the federal agents. The illegal acts of the police officers cannot lend legality to the unlawful acts of the federal agents.

Neither the police officer nor the federal agents had any regard whatever for the constitutional rights of the petitioner. The entire transaction from the time the police officers received the information until the federal agents appeared on the scene took several hours. There was sufficient time to obtain a search warrant.

The case of *Taylor* v. *United States*, 286 U. S. 1, is in point. At page 6, the court stated in part as follows:

> "Although over a considerable period numerous complaints concerning the use of these premises had been received the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility.

> "We think, in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed. * * * "

The United States Supreme Court has time and again condemned the use of evidence illegally obtained by federal agents who participate in a wrongful search and seizure. In the case of *Byars* v. *U. S.*, 273 U. S. 28, the United States Supreme Court stated, at page 33:

> "We do not question the right of the federal government to avail itself of evidence improperly seized by State officers operating entirely upon their own account. But the rule is otherwise when the federal government itself, through its agents acting as such, participates in the wrongful search and seizure. To hold the contrary would be to disregard the plain spirit and purpose of the constitutional prohibitions intended to secure the people against unauthorized official action."

In the case of *Agnello* v. *U. S.*, 269 U. S. 20, the Supreme Court of the United States condemned searches without a warrant even though there was probable cause. In that case, at page 33, the court stated:

> "Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or State, for the search of a private dwelling without a warrant. Absence of any judicial approval is persuasive argument that it is unlawful. See Enetick v. Carrington, 19 Howard's State Trials, 1030, 1066. Belief however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant, and such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

See also:

Miller v. *United States*, 50 Fed. (2nd) 505.

B.

The Police Officers and Federal Agents Acted in Concert.

The court below erred in approving the finding of the District Court that the federal agents did not act in concert with the police officers in making the raid.

The petitioner urged in the court below, that an analysis of the evidence indicated that the federal agents and the police officers were either acting in concert or had some understanding prior to the search and seizure. It was also urged in the court below that though the police officer and the federal agent testified that they were not acting in concert, their mere "say so" was not conclusive. The inherent probabilities and inferences which this court may draw from the entire case, belie their sworn testimony.

Defense counsel in cross-examining the police officer elicited that he had been on other raids with the federal agent, but the court refused to permit counsel to pursue that line of questioning further (fols. 41-42). Such refusal constituted serious and reversible error. Defense counsel sought to show a course of dealing from which the court could draw the inference that there was a mutual understanding. The police officer was experienced in raiding stills and had been on quite a few cases (fol. 31).

The court below overlooked another important portion of the testimony. The police officer testified that after he forcibly entered the apartment of the petitioner, he telephoned the home of agent Sparago, with whom he had been on previous cases (fol. 39). What other inference is to be drawn from this testimony than that some prior arrangement was made by the federal agent Sparago with the police officer. The fact that the police officer had the federal agent's home telephone number indicates that the police officer was to call the federal agent any time during the day or night.

C.

The Investigation by the City Police Officer Was Made Solely for the Purpose of Aiding the Federal Government in the Enforcement of Its Laws.

The police officer testified that he received a tip that a still was in operation and went out to investigate (fol. 30). The police officer was not investigating some state or local crime and incidental thereto had uncovered the commission of a federal offense. The police officer specifically investigated the information concerning the operation of an illegal still (fol. 30), which is a federal offense. He was acting solely for the United States to the same extent as if he were a federal agent.

In *Gambino* v. *United States,* 275 U. S. 310, the arrest and seizure were made by state troopers believing they were required to enforce the prohibition act. The search and seizure were made solely for the purpose of aiding the United States in the enforcement of its laws. No State law was involved. This court held that while it was true that the state troopers did not act under the direction of the federal agents the rights of a defendant may be evaded as effectively by such cooperation as by state officers acting under the personal direction of the federal officers. The evidence secured by the state troopers was the very foundation of the prosecution and supplied the only evidence of guilt. This court, therefore, held that the evidence so obtained violated the constitutional rights of the defendant.

In *Miller* v. *United States, supra,* the Circuit Court of Appeals held in the course of its opinion that a search and seizure were illegal when made solely on behalf of the United States.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN APPARENT CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURTS OF APPEAL FOR THE THIRD, FOURTH AND TENTH CIRCUITS AND WITH THE DECISIONS OF THIS COURT.

(a) The decision of the court below apparently conflicts with the decision in the case of *Miller* v. *U. S.*, supra, decided by the Circuit Court of Appeals for the Third Circuit. It is implicit in that decision that a search and seizure would be held unlawful when made by federal officers who enter the apartment of a defendant without a warrant of search and seizure or arrest, which apartment had been illegally and forcibly entered by police officers who likewise had no warrant of search and seizure or arrest.

(b) The decision of the court below is in apparent conflict with the decision in the case of *Sutherland* v. *U. S.*, 92 Fed. 2nd 305; Circuit Court of Appeals, Fourth Circuit.

In that case, the court condemned the use of evidence which had been obtained illegally by State officers and which had been turned over to the Federal Government, which thereafter adopted the case and prosecuted it.

(c) The decision of the court below is in apparent conflict with the decision in the case of *Gilbert* v. *U. S.*, 144 Fed 2nd 568, Circuit Court of Appeals, Tenth Circuit.

In that case, the court condemned the use of evidence illegally obtained by one other than a federal agent which evidence the government sought to use after it had adopted the case.

(d) The decision of the court below is in apparent conflict with the decisions of this court in the following cases: *Gambino* v. *U. S.*, *supra*; *Byars* v. *U. S.*, *supra*; *Agnello* v. *U. S.*, *supra*; *Gouled* v. *U. S.*, 255 U. S. 298.

The cases of *Gambino, Byars* and *Agnello* have been discussed hereinabove in this brief.

In the *Gouled* case a federal agent acquainted with the defendant obtained admission to his home upon the pretense of making a friendly call. In the temporary absence of the defendant, the agent took some of the defendant's papers which the government subsequently sought to admit into evidence. This court held, in effect, that though the agent had obtained admission in a lawful manner, the search and seizure were illegal, having been made without a warrant. This court on page 305 stated as follows:

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a government officer to obtain entrance to a man's house or office by force or an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure as it certainly would be, it is impossible to successfully contend that a like search and seizure would be an unreasonable one if only admission were obtained by stealth instead of by force or coercion.
>
> "The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights."

As hereinabove stated, the entrance by the federal agents into the home of the petitioner was illegal in the first instance. If, as the court stated in the *Gouled* case, evidence cannot be used which had been obtained after a legal entrance, can it be the law that evidence obtained after an illegal entrance can be used?

Former Attorney General George W. Wickersham, in his famous report on law enforcement, stated: "Lawless law enforcement is destructive of good government and democracy." The government's feeble attempt to justify the lawless conduct of the city and federal officers should find no sanction by this court.

CONCLUSION.

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for a writ of certiorari should be granted.

Respectfully submitted,

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FRED G. MORITT,
MORRIS EISENSTEIN,
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641650—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1090

ALFONSO DIUGUID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the circuit court of appeals (R. 32–33) has not yet been reported.

JURISDICTION

The opinion of the circuit court of appeals was rendered on January 23, 1945 (R. 32), and a petition for rehearing, filed on February 2, 1945 (R. 33–36), was denied on February 26, 1945 (R. 37–38). The judgment and order of the court for the issuance of the mandate was entered on February 27, 1945 (R. 38). The petition for a writ of certiorari was filed on March 29, 1945. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 27, 1934.

QUESTION PRESENTED

Whether the trial court erred in admitting evidence procured without a warrant by local police officers and turned over to federal agents.

STATEMENT

Petitioner was indicted in the District Court for the Eastern District of New York in four counts charging him with illegal possession of an unregistered still (26 U. S. C. 2810), with unlawfully making and fermenting mash fit for distillation and the production of spirits and alcohol (26 U. S. C. 2834), with doing business as a distiller without having filed the required bond (26 U. S. C. 2814), and with possessing distilled spirits in unstamped containers (26 U. S. C. 2803) (R. 5–7). His pre-trial motion to suppress certain evidence (see *infra*, pp. 3–5) was denied with leave to renew the motion at the trial (R. 2). He waived a jury trial (R. 8–9), and he was found guilty by the court on each of the four counts (R. 3, 21). He was sentenced to imprisonment for 18 months on each count, the sentences to run concurrently, and in addition he was sentenced to pay fines of $100 on the first count and $500 on each of the second and third counts (R. 3, 23).

The only question involved on the appeal (see R. 24–25, 32–33) and here concerns the propriety of the trial court's action in refusing to exclude at the trial the evidence used against petitioner on the ground that it was secured as the result of an illegal search and seizure by local police officers acting in concert with federal officers (R. 19–21). The proof as to the circumstances under which this evidence was obtained may be summarized as follows:

Edward Kaye, a New York City police officer (R. 10), testified that while he was on duty on the night of April 28, 1943, he received information from a private citizen and a fellow officer that a distillery was in operation at 2016 Dean Street, Brooklyn, and that shortly thereafter, accompanied by another city policeman, he went to these premises, which consisted of a three-story residence building, in which petitioner occupied an apartment on the top floor (R. 9, 10–11, 12–13). The officers did not have a search warrant. Standing outside the door of petitioner's apartment, Kaye detected the odor of fermenting mash.[1] He thereupon knocked on the door and as he did so he heard a sound "like running water." When he received no answer he forced the door and entered the apartment, where he found petitioner, a still, mash, and a quantity of distilled spirits which

[1] Kaye testified that he had participated in the seizure of a number of stills and that he could readily recognize the odor of fermenting mash (R. 11).

did not bear tax stamps. (R. 9, 11.) He arrested petitioner and seized the still and liquor (R. 10, 11; see also R. 18).[2] Kaye then went outside to a store and telephoned agent Sparago of the Federal Alcohol Tax Unit at the latter's home, advising him of the seizure of the still (R. 11–12, 13, 17–18, 19). Sparago happened to be ill at the time, and he arranged for agents Golden and Adler to go to petitioner's apartment (R. 17–18, 19), where, without a warrant, they arrested petitioner and took over the illicit still, mash, and liquor (R. 10, 14, 15, 17, 18, 19).

Kaye testified that he had no prior arrangement with the federal agents to go to petitioner's apartment (R. 11, 12). On cross-examination, he stated that he had "been on cases" with Sparago on former occasions (R. 13), that he had been on "raids" with him "two or three" times, but he denied that he had ever before telephoned Sparago after he had "raided a still," or at any other time (R. 14). Adler testified that he knew

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[2] Petitioner is mistaken in asserting (Pet. 2, 3, 8–9) that the city officers did not arrest him or seize the still and other materials found in his apartment. The record fairly indicates at the pages cited in the text that they did both. Petitioner's reliance on Kaye's negative answer to defense counsel's question on cross-examination, "And you did not arrest the defendant and bring him down to the police station and then call the Federal men, did you?" is, we think, misplaced. The question and answer import only that Kaye did not take petitioner to the police station before calling the federal agents.

nothing of the seizure until he received a call from Golden the night of April 28 advising him that the city police had seized the still and requesting him to accompany Golden to the premises (R. 17–18). Adler also testified that so far as he knew the Alcohol Tax Unit had had no complaint in respect of the operation of a still at petitioner's address and that the agents were not acting in concert with the city police in making the seizure (R. 18).

Upon this evidence, the trial court found "that the officials of the Alcohol Tax Unit and the police were not acting in concert, and that the Federal officers knew nothing about it until after the raid had been consummated" (R. 21). This finding was sustained by the Circuit Court of Appeals for the Second Circuit and the judgment of conviction was accordingly affirmed (R. 32–33, 38).

ARGUMENT

Petitioner contends that the instrumentalities of the crimes charged against him which were taken from his apartment without a warrant were obtained as the result of an unlawful search and seizure and should have been suppressed as evidence. He argues that the city police were acting in concert with the federal agents when the former entered his apartment and found the still and other materials (Pet. 11–12).

We pretermit the question whether, if there had been concerted action, the information which

had come to the city police officers' attention prior to their entry into petitioner's apartment was sufficient to justify a belief that a federal felony was there being committed and thus to permit an entry without a warrant for the purpose of making an arrest and, as an incident thereto, to search the premises for things connected with the crime.[3] For, as we shall show, it is clear from the evidence that there was no collaboration between Kaye and the federal agents; and, as the court below pointed out (R. 33), it is settled that in the absence of any federal cooperation, the admissibility in a federal criminal trial of evidence secured by others than federal officers is not affected by the legality or illegality of the method by which it is procured. *Burdeau* v. *McDowell*, 256 U. S. 465, 475; *Weeks* v. *United States*, 232 U. S. 383, 398; *Edgmon* v. *United States*, 87 F. 2d 13, 15 (C. C. A. 10); *In re Milburne*, 77 F. 2d 310, 311 (C. C. A. 2); *Miller* v. *United States*, 50 F. 2d 505, 507–508 (C. C. A. 3), certiorari denied, 284 U. S. 651; *Vollmer* v. *United States*, 2 F. 2d 551, 552 (C. C. A. 5).

Petitioner seeks to avoid the application of this rule by arguing, contrary to the findings of both

[3] Compare, however, *Agnello* v. *United States*, 269 U. S. 20, 30, 32, 33; *United States* v. *Feldman*, 104 F. 2d 255 (C. C. A. 3); *Rocchia* v. *United States*, 78 F. 2d 966, 969 (C. C. A. 9); *Wida* v. *United States*, 52 F. 2d 424, 425 (C. C. A. 8); *McBride* v. *United States*, 284 Fed. 416 (C. C. A. 5), certiorari denied, 261 U. S. 614.

Feldman v. United States, 322 U.S. 487, 492;

courts below (R. 21, 33), that the federal agents were in fact acting in concert with the local police in the search and seizure. His argument in this regard proceeds in part upon the erroneous hypothesis that the federal agents, rather than the local police, made the initial arrest and seizure (see Pet. 2, 3, 7, 8–9). But, as we have pointed out in the Statement (*supra,* p. 4), the evidence shows that upon their discovery of the still the police officers arrested petitioner and seized the still and other materials, and that the federal agents "took over" (see R. 14, 18) this evidence and arrested petitioner (R. 18) upon their subsequent arrival pursuant to officer Kaye's telephone call to agent Sparago. In addition, Kaye's testimony shows without contradiction that the initial arrest and seizure were made entirely upon his own initiative as the result of information secured from others and his own observation, and that no prearrangement existed with the federal agents whereby he would secure the evidence for them. Kaye's testimony in this regard was corroborated by agent Adler, who stated that he had no prior knowledge of the existence of the still or the raid. (See pp. 3–5, *supra.*) Kaye's testimony on cross-examination that he was acquainted with Sparago and had participated with him in other "raids," upon which petitioner relies as showing cooperation between Kaye and the agents, is of no significance in view of the direct proof

that there was no collaboration in the instant case.[4] By the same token it is immaterial that the federal agents took over the evidence at the premises where it was found, rather than at a place to which the police might have transferred it before notifying the agents of the federal crimes which they had discovered.[5]

There is no merit in petitioner's further contention that the decision below is in "apparent conflict" with the decisions of this Court and of other circuit courts of appeals upon which he relies (Pet. 13–14). Thus, *Miller* v. *United States*, 50 F. 2d 505 (C. C. A. 3), held that evidence obtained under circumstances analogous to

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[4] The trial court refused to permit further inquiry on cross-examination of Kaye as to whether these earlier seizures were made without warrants (R. 14, 15), and petitioner complains that this was error (Pet. 11). While proof that such was the fact may perhaps have been relevant as tending to show cooperation between Kaye and Sparago, the court's ruling did not prejudice petitioner, since the proof that there was no concert of action in this case was uncontradicted.

Petitioner also adverts to the fact that Kaye telephoned Sparago immediately after the initial seizure and he infers that Kaye had Sparago's home telephone number (Pet. 11). The record shows, however, that Kaye left petitioner's apartment and called Sparago from a nearby store (R. 13). For all that appears he may have looked up Sparago's home telephone number in the directory.

[5] There is clearly no basis for petitioner's argument that the federal agents entered his apartment illegally (Pet. 7–10). They had been definitely advised by the city police that the latter had seized an illicit still at petitioner's apartment and that they had petitioner in custody there.

those presented here was admissible. The *Gambino* (275 U. S. 310) and *Sutherland* (92 F. 2d 305 (C. C. A. 4)) decisions likewise turned upon the particular facts presented, the proof in those cases having disclosed that the local officers either acted on behalf of or pursuant to an understanding with the federal authorities in making the seizures held to be illegal,[6] while in *Byars* v. *United States,* 273 U. S. 28, a federal agent participated directly with a state officer in a search made under color of a state search warrant which was held to be invalid under federal law. In *Gilbert* v. *United States,* 144 F. 2d 568 (C. C. A. 10), the illegal search was made by one who the court held was a federal officer, and, moreover, the proof showed an understanding between that officer and other federal officers whereby the Government would take over the prosecution of crimes discovered by him. The *Agnello* (269 U. S. 20) and *Gouled* (255 U. S. 298) cases are wholly inapposite, for the illegal searches and seizures involved there were made by federal officers themselves.

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[6] There is no such situation in the instant case. Not only did the evidence disclose that there was no concerted action between the federal agents and city police, but under New York law, contrary to petitioner's implication (Pet. 12), the unlicensed manufacture for sale of any alcoholic beverage is a misdemeanor, punishable by fine or imprisonment for one year, or both. McKinney's Consolidated Laws of New York Book 3, Alcoholic Beverage Control Law §§ 60, 61, 100, 130, as amended.

CONCLUSION

The settled legal principles governing the admissibility of the challenged evidence were correctly applied by the courts below, and the case presents no real conflict of decisions or question of general importance requiring further review by this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER.

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STATEMENT.

The petitioner herein has been granted leave to file this reply brief by May 4, 1945.

ARGUMENT.

A.

It is apparent from the tenor of the government's brief and its statement of the "question presented" that the government relies upon an erroneous interpretation of the evidence. The government's argument becomes invalid upon a realization that it is based entirely upon the false premise that it was the police officer who seized the evidence and arrested the defendant.

The facts, however, are that the federal agent, without permission and without a warrant of search and seizure or arrest, entered the apartment of the petitioner and seized the evidence and arrested the petitioner therein.

At page "4" of its brief, the government alleges that Police Officer Kaye arrested the petitioner and seized the still and refers the Court to R. 10, 11 and 18. The references do not sustain the government's allegations of fact.

At page "10" of the record, there is not a single statement concerning an arrest or seizure.

At page "11" of the record, there is no evidence that Police Officer Kaye arrested the petitioner and seized the still. The only statement concerning a seizure may be found in a question asked of Kaye by government counsel as follows:

> "Q. How did the Federal men get there? A. They got there approximately an hour and a half later.
> Q. And what did you do? A. I phoned.
> Q. After you made the seizure? A. That's right."

The question "After you made the seizure?" was highly improper, since it assumed a fact not in evidence. A statement of an alleged fact incorporated in a question is not proof.

The record however, is replete with evidence that it was the federal agent who arrested the petitioner and seized the still.

At page "14" of the record, Police Officer Kaye in answer to questions propounded by the Court admitted that the federal agents took over the still:

> "The Court: Objection sustained. (To witness): Did the federal agents come later on, to the house?
> The Witness: Yes.
> The Court: And take over the still?
> The Witness: Yes."

At page "18" of the record, Federal Agent Adler admitted that he took over the still and arrested the petitioner, in answer to questions propounded by the Court:

> "Q. You took over the still then, is that right? A. Yes.
>
> Q. And you put this defendant under arrest? A. That's right."

Conceding that the police officer was first on the scene and forcibly entered the petitioner's apartment, the facts show that he never made a legal seizure or arrest. The police officer neither removed the subject of the seizure from the apartment nor made a formal arrest. Section 165 of the Code of Criminal Procedure of the State of New York, specifically provides that a defendant, upon his arrest, must in all cases be taken before a Magistrate without unnecessary delay. That was not done. The fact that the police officer neither took the petitioner to a police station nor arraigned him before a Magistrate is strong, perhaps conclusive, evidence that he never made an arrest.

B.

The government's brief studiously avoids the main issue to wit: did the federal agent violate the petitioner's constitutional rights when he entered the apartment of the petitioner without permission and without a warrant of search and seizure or arrest, and seize the evidence and arrest the petitioner. The government in its brief at page "8" footnote "5" makes the bald statement that there is no basis for petitioner's argument, that the federal agent entered his apartment illegally. That is the very questions which this Court must decide. The government neither cites any authority nor refers to any portion of the record to justify its allegation.

C.

The government's brief at page "8" footnote "4" concedes that error was committed by the Trial Court in refusing to permit petitioner's counsel on cross-examination of Police Officer Kaye to inquire whether earlier seizures were made without warrants. The Court also refused to permit defense counsel to cross-examine the police officer to elicit whether he had been on other raids with the federal agent. The only practical method an accused has to prove concert of action between the federal agent and police officer is by circumstantial evidence. An accused must be permitted wide latitude upon cross-examination to develop facts of previous raids and agreements between the federal agent and police officer from which the Court and jury could logically infer that the same methods were used in the case at bar. The Court's refusal to permit such inquiry constituted serious reversible error.

D.

At footnote "4", page "8" of its brief, the government indulges in pure speculation when it states that "for all that appears he may have looked up Sparago's home telephone number in the directory". There is nothing in the record to justify the government's allegation. If the Court desires to indulge in speculation it could reasonably believe that there was an agreement between the federal agent, Sparago and the police officer, that Sparago be called the moment the police officer illegally entered the home of the petitioner and found any evidence of crime and for that purpose Sparago gave the police officer his home telephone number.

E.

In further support the petitioner's argument set forth at page "7" of his main brief, counsel directs the Court's attention to two additional cases, *Dennert* v. *United States*,

147 Fed. Reporter 2nd 286, C. C. A. Sixth Circuit; and *Amos* v. *United States*, 255 U. S. 313.

In the *Dennert* case, a United States revenue agent broke into Dennert's house without a search warrant. Among other things, the agent sought to justify the search by asserting that the search had been consented to by a tenant in another portion of the premises who had neither control nor dominion over the locked rooms which had been broken into. The Court held the search invalid, and in violation of the defendant's rights. The Court there incidentally held that there was ample opportunity to obtain a search warrant.

In the *Amos* case the government sought to justify a search without a warrant on the ground that the wife of the accused permitted the federal agents access to the premises. The Court held the search invalid, stating in part as follows at page 317:

> "We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected."

Nor was any such waiver effected in the case at bar by the police officer who was forcibly in possession of the petitioner's home. If as in the *Dennert* case, a tenant who had no control or dominion over the premises searched cannot waive an accused's constitutional rights, or if, as in the *Amos* case, the coercion of a wife could not constitute a waiver of her husband's rights, it must necessarily be held that Police Officer Kaye, a trespasser, who had no right to be on the premises, had no authority or power to waive the constitutional rights of the petitioner and permit a federal agent to enter, seize evidence and make an arrest. As a consequence, the federal agent, acting without lawful authority, became as responsible for his illegal acts as if he himself had initiated the search, thus invalidating the seizure and arrest.

CONCLUSION.

For the reasons stated in the petition, the original brief and in this reply brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

Respectfully submitted,

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